UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RONNIE LEE CRUICKSHANK, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CASE NO. C20-0924JLR ORDER DENYING 28 U.S.C. § 2255 MOTION TO VACATE JUDGMENT

I. INTRODUCTION

Before the court is Petitioner Ronnie Lee Cruickshank's motion to vacate the judgment in his criminal matter under 28 U.S.C. § 2255. (Mot (Dkt. # 1); *see also* Reply (Dkt. # 6).) Mr. Cruickshank contends that the court must vacate his conviction in his criminal matter in light of the Supreme Court's decision in *Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191 (2019). Respondent the United States of America ("the Government") opposes Mr. Cruickshank's motion. (Resp. (Dkt. # 5).) Neither party has

requested oral argument or an evidentiary hearing on Mr. Cruickshank's motion.[1] (*See generally* Mot.; Resp.; Reply.) The court has considered the motion, all submissions filed in support of and in opposition to the motion, the relevant portions of the record, and the applicable law. Being fully advised, the court DENIES Mr. Cruickshank's motion to vacate the judgment in his criminal matter.

II. BACKGROUND

On December 13, 2017, the Government charged Mr. Cruickshank by complaint with two counts of distribution of methamphetamine, in violation of 18 U.S.C §§ 841(a)(1) and (b)(1)(B) and one count of felon in possession of a firearm in violation of 18 U.S.C § 922(g)(1). (Compl. (CR Dkt.[2] # 1).) The Government accused Mr. Cruickshank of selling 98% pure methamphetamine to an undercover Drug Enforcement Administration officer on two separate occasions. (*See id.* at 4-7.) The Government alleged by affidavit that Mr. Cruickshank had sold a half pound of methamphetamine to the undercover officer during the first controlled purchase and a pound of methamphetamine during the second controlled purchase. (*See id.*) Officers searched Mr. Cruickshank's residence in conjunction with his arrest for distribution and found a 9mm handgun. (*See id.* at 7.) With respect to the charge of felon in possession of a firearm, the complaint alleges that Mr. Cruickshank had previously been convicted, as an

[1] Further, because the court determines that the records and files conclusively show that Mr. Cruickshank is not entitled to § 2255 relief, the court concludes that there is no need for an evidentiary hearing.

[2] The court uses the shorthand "CR Dkt." when citing to documents in the docket of Mr. Cruickshank's criminal case, *United States v. Cruickshank*, No. CR17-0323JLR (W.D. Wash.).

adult, of six crimes punishable by imprisonment for a term exceeding one year, including a conviction for conspiracy to manufacture methamphetamine on January 11, 2008.[3] (*Id.* at 2-3.)

On December 20, 2017, the Grand Jury returned an indictment against Mr. Cruickshank for two counts of distribution of methamphetamine, in violation of 18 U.S.C §§ 841(a)(1) and (b)(1)(B) and one count of felon in possession of a firearm in violation of 18 U.S.C § 922(g)(1). (Indictment (CR Dkt. # 11).) The indictment recites Mr. Cruickshank's six previous convictions for crimes punishable by imprisonment for a term exceeding one year and alleges that Mr. Cruickshank knowingly possessed the handgun. (*Id.* at 2-3.)

At his arraignment on January 2, 2018, Mr. Cruickshank pleaded not guilty to all charges. (*See* 1/2/18 Min. Entry (CR Dkt. # 17).) On May 30, 2018, Mr. Cruickshank changed his plea to guilty to one charge of distribution of methamphetamine and the charge of felon in possession. (*See* 5/30/18 Min. Entry (CR Dkt. # 36); Plea Agreement (CR Dkt. # 38); *see also* R&R (CR Dkt. # 39); Order of Acceptance (CR Dkt. # 40).) The plea agreement recites the following elements for the felon in possession charge: "*First*, the defendant knowingly possessed a firearm; *Second*, the firearm had been shipped or transported from one state to another or between a foreign nation and the United States; and *Third*, at the time the defendant possessed the firearm, the defendant

[3] Federal District Judge Robert S. Lasnik sentenced Mr. Cruickshank to 84 months' imprisonment for that crime. (*See* Presentence Investigation Report ("PSR") (CR Dkt. # 44) (sealed) ¶ 44.)

had been convicted of a crime punishable by imprisonment for a term exceeding one year." (Plea Agreement at 2 (emphasis in original).) The plea agreement also specifies that Mr. Cruickshank waived "any right to bring a collateral attack against the conviction and sentence, including any restitution order imposed, except as it may relate to the effectiveness of legal representation[.]" (*Id.* at 10.)

On October 11, 2018, the court sentenced Mr. Cruickshank to 72 months of imprisonment on each of the two counts, to be served concurrently, followed by five years of supervised release. (Judgment (CR Dkt. # 51) at 1-3.)

On June 21, 2019, the Supreme Court issued its decision in *Rehaif*, in which it overruled longstanding precedent from the Ninth Circuit—and every other circuit that had addressed the issue—concerning the scope of 18 U.S.C. § 922(g)(1). The Supreme Court held that § 922(g)(1) requires that the individual know not only that he possessed a firearm but also that he belonged to one of the prohibited categories listed in § 922(g)(1) when he possessed the firearm. *See Rehaif*, 139 S. Ct. at 2194. Before *Rehaif*, the Government could secure a felon-in-possession conviction by proving that the defendant knowingly possessed a firearm, even if the defendant did not know that he had been convicted of a felony—defined under the statute as a crime punishable by more than one year in prison—or was otherwise within a category of persons who cannot legally possess a firearm. *See United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003) (citing *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997) (holding that the knowledge requirement "only applies to the possession element of § 922(g)(1), not to . . . felon status.")). After the Supreme Court's decision in *Rehaif*, the Government must now

"prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200.

On June 16, 2020, Mr. Cruickshank filed the instant 28 U.S.C. § 2255 motion to vacate his conviction and set aside the judgment in his criminal case. (*See generally* Mot.) In his petition, Mr. Cruickshank contends that the court must vacate his guilty plea under 18 U.S.C. § 922(g) because the plea, which omitted the element requiring his knowledge of his status as a felon, was not knowing and intelligent under *Rehaif*. Mr. Cruickshank did not file a direct appeal of his conviction and sentence, nor has he previously filed a § 2255 motion. (*See generally* CR Dkt.)

III. ANALYSIS

The Government concedes that Mr. Cruickshank's § 2255 motion is timely because Mr. Cruickshank filed his motion within one year of the issuance of *Rehaif*, which the Government agrees announced a new substantive rule of law that applies retroactively. (Resp. at 4 (citing 28 U.S.C. § 2255(f)(3)).) Nevertheless, the Government argues that the court cannot reach the merits of this case for three reasons: because the "concurrent-sentence doctrine" provides the court discretion to dismiss the motion outright; because Mr. Cruickshank waived his right to bring a collateral attack on his conviction and sentence through his plea agreement; and because Mr. Cruickshank procedurally defaulted his motion by failing to file a direct appeal of his conviction and sentence. Mr. Cruickshank contends that he can overcome these hurdles and that the court should grant his motion on the merits. For the reasons set forth below, the court

finds that Mr. Cruickshank cannot satisfy the substantial burdens placed on him to excuse his procedural default, and as a result, the court need not consider the merits of Mr. Cruickshank's motion.

A. Concurrent-Sentence Doctrine

As a preliminary matter, the Government suggests that the court should dismiss Mr. Cruickshank's motion under the concurrent-sentence doctrine. (Resp. at 2). This doctrine "provides the court with discretion not to reach the merits of a claim attacking fewer than all multiple concurrent sentences if success on the claim would not have any collateral consequences or change the term of imprisonment." *United States v. Beckham*, 202 F. Supp. 3d 1197, 1201 (E.D. Wash. 2016) (citing *Benton v. Maryland*, 395 U.S. 784 (1969)). The Government argues that the doctrine applies here because even if the court were to vacate Mr. Cruickshank's felon-in-possession conviction, Mr. Cruickshank will remain subject to the concurrent 72-month sentence imposed for his narcotics conviction. (Resp. at 2.)

The court declines to apply the concurrent-sentence doctrine. In *United States v. DeBright*, 730 F.2d 1255, 1260 (9th Cir. 1984) (*en banc*), the Ninth Circuit rejected the use of the concurrent-sentence doctrine as a discretionary means of avoiding review of criminal convictions on direct appeal. The Ninth Circuit expressed "serious doubts . . . about [its] ability to ascertain all the adverse collateral legal consequences of unreviewed convictions" and concluded that addressing the merits of all convictions before the court on appeal would "guarantee that no individual will suffer because of our inability to foretell the future effects of an unreviewed conviction." *DeBright*, 730 F.2d

at 1258, 1259; *see also United States v. Adams*, 814 F.3d 178, 181 n.1 (4th Cir. 2016) ("Felony convictions carry a myriad of collateral consequences above and beyond time in prison, including the possibility that a future sentence will be enhanced based on the challenged conviction, the possibility of using the conviction for future impeachment, and societal stigma."). Although *DeBright* did not address the use of the concurrent-sentence doctrine in the § 2255 context, the court has found no Ninth Circuit case since *DeBright* that has applied the concurrent-sentence doctrine to dismiss a § 2255 petition. The court is persuaded that the Ninth Circuit's reasoning in *DeBright* applies with equal strength in the § 2255 context and declines to dismiss Mr. Cruickshank's motion under the concurrent-sentence doctrine.

B. Waiver

The Government next argues that Mr. Cruickshank waived his right to file a § 2255 motion in his plea agreement. (*See* Resp. at 3; *see* Plea Agreement at 10.) The Government asserts that the waiver applies because Mr. Cruickshank "does not contend that his plea agreement is defective in any manner." (*See* Resp. at 3.) Mr. Cruickshank's sole claim, however, is that his plea was not knowing and intelligent because he was not informed of an element of one of his offenses. (*See* Mot. at 5.) Because the court finds, as discussed below, that Mr. Cruickshank's motion is procedurally defaulted, the court declines to resolve the issue of waiver.

C. Procedural Default

The Supreme Court has strictly limited the circumstances under which a defendant may collaterally attack his guilty plea. *Bousley v. United States*, 523 U.S. 614, 621

(1998). In general, 'the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Id.* (citations omitted). The parties do not dispute that Mr. Cruickshank's 28 U.S.C. § 2255 petition is procedurally defaulted because he never challenged his plea at his sentencing or on direct appeal. (*See* Resp. at 6; Reply at 3.)

Mr. Cruickshank, however, argues that he can overcome his procedural default by showing both cause excusing his procedural default and actual prejudice resulting from the errors of which he complains. (Reply at 3 (citing *Bousley*, 523 U.S. at 622)); *see also United States v. Frady*, 456 U.S. 152, 168 (1982). The court concludes that he cannot meet this burden.

1. Cause

A defendant can demonstrate cause sufficient to excuse a default by showing that an "objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule" such as a "factual or legal basis for a claim [that] was not reasonably available to counsel." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A claim is considered unavailable only if it is based on a newly-recognized rule that "'is so novel that its legal basis is not reasonably available to counsel,'" and thus a defendant could not have been expected to raise the issue earlier. *Bousley*, 523 U.S. at 622 (quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)).

Mr. Cruickshank argues that the legal basis for his claim was not "reasonably available" at the time he entered his plea because the circuit courts unanimously held, prior to *Rehaif*, that 18 U.S.C. § 922(g) did not require proof that the defendant knew of his

prohibited status at the time he possessed the firearm. (Reply at 3-4 (citing cases).)

This court has previously rejected a petitioner's argument that he had cause excusing his procedural default of a *Rehaif* claim based on the state of the law prior to *Rehaif*. In *Mujahidh v. United States*, No. C19-1852JLR, 2020 WL 1330750 (W.D. Wash. Mar. 23, 2020), this court held that the petitioner could not demonstrate cause because the issue of whether the scienter requirement applied to a defendant's prohibited status under § 922(g) was not "so novel" at the time of Mr. Mujahidh's plea and sentencing so as not to have been available to counsel. *Mujahidh*, 2020 WL 1330750, at *3. Observing that the issue had been litigated for many years, the court concluded that the issue of whether Mr. Mujahidh's knowledge of his prohibited status was a required element for a conviction under § 922(g) was "reasonably available" to his counsel at the time of his plea. *Id.* (citing cases). As a result, the court held that Mr. Mujahidh could not establish cause and his *Rehaif* claim was procedurally defaulted. *Id.*

Mr. Cruickshank argues that his case can be distinguished from *Mujahidh* because Mr. Mujahidh filed his § 2255 petition *pro se* and therefore did not have the benefit of counsel to direct the court's attention to the "near-unanimous body of lower court authority" that would support a finding of cause. (Reply at 4 (quoting *Reed*, 468 U.S. at 17).) The court, however, reads the cases it cites in its orders, and was aware at the time it issued *Mujahidh* of the pre-*Rehaif* consensus among the Courts of Appeals on the knowledge-of-status issue. Indeed, the dissent in *Rehaif* points out that "every single Court of Appeals to address the question" had concluded that the Government was not required to prove that the defendant knew of his prohibited status at the time he possessed

the firearm in order to secure a conviction under 18 U.S.C. § 922(g). *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). Furthermore, district courts throughout the circuits have, as this court did in *Mujahidh*, deemed the knowledge-of-status issue to have been reasonably available prior to *Rehaif*. *See, e.g.*, *United States v. Catlett*, No. 10-CR-324-1, 2020 WL 5982266, at *2 (E.D. Pa. Oct. 8, 2020) (Third Circuit); *Beck v. United States*, No. 20-CV-67, 2020 WL 5942578, at *14 (E.D. Mo. Oct. 7, 2020) (Eighth Circuit); *Gayle v. United States*, No. 19-CV-62904, 2020 WL 4339359, at *4 (S.D. Fla. July 28, 2020) (Eleventh Circuit); *United States v. Vasquez-Ahumada*, No. 18-CR-5, 2020 WL 3213397, at *2 (W.D. Va. June 15, 2020) (Fourth Circuit); *United States v. Hisey*, No. 18-40063-01-DDC, 2020 WL 2915036, at *3-4 (D. Kan. June 3, 2020) (Tenth Circuit); *United States v. Scott*, No. 17-CR-23, 2020 WL 1030927, at *13 (E.D. La. Mar. 3, 2020) (Fifth Circuit); *Gray v. United States*, No. 19-C-607, 2020 WL 127646, at *3 (M.D. Tenn. Jan. 10, 2020) (Sixth Circuit).[4] The court does not, therefore, depart from its prior holding in *Mujahidh* that *Rehaif* did not create a newly-recognized and novel rule that would support a finding of cause.

2. Actual Prejudice

The court further finds that Mr. Cruickshank cannot demonstrate that the *Rehaif* error in his case resulted in actual prejudice. To demonstrate actual prejudice to overcome a procedural default, Mr. Cruickshank must show "not merely that the errors

[4] A minority of courts, however, have concluded that the knowledge of status issue was not reasonably available prior to *Rehaif*. *See, e.g.*, *United States v. Torres*, No. 211CR141JCMCWH, 2020 WL 5518606, at *3 (D. Nev. Sept. 14, 2020) (Ninth Circuit).

at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray*, 477 U.S. at 494 (emphasis in original).

Although both parties cite the above language from *Murray*, they disagree on the specific standard that Mr. Cruickshank must meet in order to show actual prejudice. Mindful of the Supreme Court's admonition that the standard for finding cause and prejudice to excuse a procedural default is a "significantly higher hurdle than would exist on direct appeal," *Frady*, 456 U.S. at 166, the court agrees with the Government that, at minimum, Mr. Cruickshank must show that the court's *Rehaif* error would have been reversible plain error if it were raised on direct appeal. (*See* Resp. at 8.) The Ninth Circuit has determined, in a recent unpublished case, that a defendant bringing a direct appeal of a *Rehaif* error must show "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Espinoza*, 816 F. App'x 82, 84 (9th Cir. 2020) (quoting *United States v. Bain*, 925 F.3d 1172, 1178 (2020)). Thus, Mr. Cruickshank must show at least a reasonable probability that, but for the *Rehaif* error, he would not have pleaded guilty to the felon-in-possession charge in order to show prejudice. This he cannot do.

Mr. Cruickshank makes no argument, much less points to any evidence, that he would have gone to trial instead of pleading guilty if he were aware that the Government would have to prove that he knew he had a prior conviction for a crime punishable by more than one year in prison. *See Espinoza*, 816 F. App'x at 84. Moreover, the record before the court includes substantial evidence that Mr. Cruickshank knew of his status as

a convicted felon. According to the presentence report prepared in his criminal case, at the time he possessed the handgun, Mr. Cruickshank had previously received prison sentences of 14 months and 84 months. (PSR ¶¶ 14 & 44.) In light of the sentences imposed in his earlier cases, Mr. Cruickshank could not plausibly assert that a jury would find that he was unaware of his status as a person previously convicted of an offense punishable by more than a year in prison.[5] *Cf. Rehaif*, 139 S. Ct. at 2198 (noting that a defendant "who was convicted of a prior crime but sentenced only to probation" might be able to claim that he did not know he had been convicted of a crime punishable by more than a year of imprisonment); *Nair v. United States*, No. C19-1751JLR, 2020 WL 1515627, at *3 (W.D. Wash. Mar. 30, 2020) (excusing procedural default where the petitioner was actually innocent because his prior crime did not meet the § 922(g)(1) criteria). In these circumstances, Mr. Cruickshank cannot show that the *Rehaif* error caused him actual prejudice.

Mr. Cruickshank argues that a plain-error standard has no place in the court's analysis of prejudice in this case. Instead, he argues that the court must find that he suffered actual prejudice because the omission of the knowledge-of-status element "completely eliminat[ed] any incentive to develop defense arguments on his mental state at the time of the firearm possession." (Reply at 6.) The court finds, however, that Mr. Cruickshank's assertion that he *might* have developed defense arguments relating to his

[5] As the Eleventh Circuit has observed, "Most people convicted of a felony know that they are felons. . . [a]nd someone who has been convicted of felonies repeatedly is especially likely to know he is a felon." *United States v. Innocent*, 977 F.3d 1077, 1082 (11th Cir. 2020) (internal citations omitted).

mental state had he known of the omitted element shows no more than a "*possibility* of prejudice" rather than the "*actual* and substantial disadvantage" required under *Murray*.[6]

Mr. Cruickshank also argues that the court should excuse his procedural default because the *Rehaif* error is structural. (Reply at 7-8.) The court declines to do so. The "purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, __ U.S. __, 137 S. Ct. 1899, 1907 (2017). The Supreme Court, however, has made clear that "most constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 7 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). The Court has found an error to be "structural, and thus subject to automatic reversal, only in a very limited class of cases." *Id.* (internal citations and quotation marks omitted).[7] Neither the Supreme Court nor the Ninth Circuit has found a constitutionally invalid guilty plea to be a structural error, and all but one of the circuits to consider the question have found that a *Rehaif* error in the context of a guilty plea is not structural. *See United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196 (10th Cir. 2020); *United States v. Hicks*, 958 F.3d 399 (5th Cir. 2020); *Carlyle v. United States*, __ F. App'x __, No. 20-11399, 2020 WL 6844052, at *2

[6] Mr. Cruickshank's reliance on *Henderson v. Morgan*, 426 U.S. 637 (1976) does not assist him here. The Supreme Court surveyed the factual record in that case before vacating the defendant's plea to second degree murder on the ground that he was not informed that an intent to cause the death of his victim was an element of the offense. *Id.* at 645-46. In addition, the defendant in *Henderson* asserted that he would not have pleaded guilty had he known of the omitted element. *Id.*

[7] The Court concluded, for example, that a jury instruction that omits an element of an offense is not structural because such an omission "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9.

(11th Cir. Nov. 23, 2020); *see also United States v. Watso*n, 820 F. App'x 397, 400-01 (6th Cir. 2020) (determining that the defendant's argument that the *Rehaif* error was structural was foreclosed by circuit precedent requiring a showing of prejudice on plain error review in the *Rehaif* context). *But see United States v. Gary*, 954 F.3d 194, 205 (4th Cir. 2020), *r'hg en banc denied*, 963 F.3d 420 (finding that a *Rehaif* error is structural). In *Rehaif* itself, the Supreme Court remanded for harmless-error review rather than reversing the conviction outright. *Rehaif*, 139 S. Ct. at 2200. The court agrees with the weight of authority that a *Rehaif* error is not structural.

In sum, the court concludes that Mr. Cruickshank has not demonstrated cause and actual prejudice that would excuse his procedural default. As a result, the court does not address the merits of Mr. Cruickshank's motion. Because Mr. Cruickshank's motion is procedurally defaulted, the court DENIES Mr. Cruickshank's 28 U.S.C. § 2255 motion to vacate the judgment in his criminal matter.

D. Certificate of Appealability

Finally, the court determines that it is appropriate to issue a certificate of appealability in this case. A habeas petitioner can appeal the denial of a 28 U.S.C. § 2255 petition only after obtaining a "certificate of appealability." 28 U.S.C. § 2253(c); *see generally United States v. Asrar*, 116 F.3d 1268, 1269-70 (9th Cir. 1997). A court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That is, a petitioner must show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to

deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted); *see Hanson v. Mahoney*, 433 F.3d 1107, 1112 (9th Cir. 2006). A certificate of appealability should be granted for any issue that the petitioner can demonstrate is debatable among jurists of reason, could be resolved differently by a different court, or is adequate to deserve encouragement to proceed further. *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002). The court must resolve doubts about the propriety of a certificate of appealability in the petitioner's favor. *Id*.

Mr. Cruickshank seeks a certificate of appealability on the question of whether a *Rehaif* error in a guilty plea case is structural. (Reply at 14.) Because the courts of appeals are split on this question, *see supra* Section III.C.2, the court is persuaded that this issue is debatable among jurists of reason. The court grants Mr. Cruickshank's request for a certificate of appealability on the issue of whether a *Rehaif* error in a guilty plea case is structural error.

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IV. CONCLUSION

For the foregoing reasons, the court DENIES Mr. Cruickshank's motion to vacate the judgment in his criminal matter under 28 U.S.C. § 2255 (Dkt. # 1) and GRANTS a certificate of appealability on the issue of whether a *Rehaif* error in a guilty plea case is structural error.

Dated this 4th day of December, 2020.

JAMES L. ROBART
United States District Judge